



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

BRIAN D. ANDERSON,
Petitioner,
v.
FRANK X. CHAVEZ, Warden,
Respondent.

} Case No. CV 13-06676 AN
} **ORDER DISMISSING PETITION FOR
WRIT OF HABEAS CORPUS BY A
PERSON IN STATE CUSTODY
PURSUANT TO 28 U.S.C. § 2254
WITH PREJUDICE AS TIME-BARRED**

Before the Court is Respondent's Motion to Dismiss ("MTD") [17] the pending petition for writ of habeas corpus by a person in state custody pursuant to 28 U.S.C. § 2254 ("Petition"). The parties have consented to the Magistrate Judge's jurisdiction. (See [2], [9], [15], [16].) For the reasons discussed below, the MTD is granted and the Petition is dismissed with prejudice because it is time-barred.

I. BACKGROUND

A. State Court Proceedings

On August 8, 1996, Brian D. Anderson ("Petitioner") was convicted of eight counts of second degree robbery (CAL. PENAL CODE § 211) and one count of assault with a firearm (CAL. PENAL CODE § 245(a)(2)), following a jury trial in the California Superior Court for Los Angeles County (case no. GA015750). The jury also found true

1 allegations that in the commission of all nine offenses, Petitioner personally used a
 2 handgun (CAL. PENAL CODE § 12022.5(a)). Petitioner was acquitted of one count of
 3 second degree robbery. (Reporters' Transcript on Appeal ("RT") (Respondent's
 4 Lodged Document ("LD") 2) at 2857-62; Clerk's Transcript ("CT") (LD 1) at 2135-
 5 44.) Additionally, Petitioner admitted he had suffered one prior second-degree robbery
 6 conviction, which qualified as a "strike" under California's Three Strikes law (CAL.
 7 PENAL CODE §§ 667(b)-(i), 1170.12(a)-(d)), and as a serious felony for sentence
 8 enhancement purposes under CAL. PENAL CODE § 667(a). (RT at 2874-76; CT at
 9 2172.) Petitioner was sentenced to a total term of fifty-six years and eight months in
 10 state prison. (RT at 2932-34; CT at 2185-87.)

11 Petitioner appealed his sentence to the California Court of Appeal. (LD 4.) On
 12 April 8, 1998, in an unpublished opinion (case no. B107735), the court of appeal
 13 affirmed the judgment. (LD 6.) Petitioner did not file a petition for review in the
 14 California Supreme Court. (Pet. at 3; MTD at 2.)

15 On February 6, 2007, Petitioner filed a habeas petition in the Los Angeles
 16 Superior Court raising two new sentencing claims. (LD 7.) On March 2, 2007, the
 17 superior court denied the petition. (LD 8 at 1-2.)

18 On December 19, 2011, Petitioner filed an additional habeas petition in the
 19 superior court, this time arguing that one of the witnesses at his trial, Eric Donaldson,
 20 was now retracting his testimony, and that constituted newly-discovered evidence of
 21 Petitioner's actual innocence on four of the nine counts of conviction. (LD 9.) On
 22 January 18, 2012, the superior court denied that petition on the basis that "[t]here were
 23 numerous witnesses who testified against the defendant at his trial and gave, what the
 24 jury found, substantial evidence of his guilt." (LD 8 at 2.)

25 On October 3, 2012, Petitioner filed a habeas petition in the California Court of
 26 Appeal raising the same arguments about Donaldson's allegedly false testimony and
 27 subsequent retraction. (LD 10.) On October 23, 2012, the state court of appeal denied
 28 the petition without comment or citation (case no. B244328). (LD 11.) On December

1 31, 2012, Petitioner filed a habeas petition in the California Supreme Court raising
 2 substantially the same arguments, and on May 22, 2013, that petition was denied
 3 without comment or citation (case no. S207690). (LD 12&13.)

4 **B. Pending Proceedings**

5 On September 3, 2013, Petitioner, proceeding *pro se*, constructively filed^{1/} the
 6 pending Petition raising three claims challenging his August 8, 1996 conviction as to
 7 four of the nine counts. All three claims are based upon the same allegedly newly-
 8 discovered evidence, i.e., that Donaldson is now retracting his testimony and claiming
 9 he was improperly coached by law enforcement to testify falsely. (Pet. at 5-6; attached
 10 pages (4); attached 11/26/10 Hi-Caliber Investigations Witness Statement (“Witness
 11 Statement”); attached Declaration of Eric Donaldson (“Donaldson Decl.”).) On
 12 December 4, 2013, Respondent filed the pending MTD arguing that the Petition should
 13 be dismissed because it is time-barred by more than fourteen years, and that Petitioner
 14 has failed to present a credible showing of actual innocence sufficient to constitute an
 15 equitable exception to the applicable one-year statute of limitation. (MTD at 11-23.)
 16 Petitioner has filed his Opposition to the MTD [19]. Because the Court finds in
 17 Respondent’s favor, below, it is unnecessary that Respondent file a reply, and the
 18 matter now stands ready for decision.

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23 ^{1/} Pursuant to the “mailbox rule,” a *pro se* prisoner’s federal habeas petition is
 24 deemed to be filed on the date the prisoner delivers the petition to prison authorities for
 25 mailing to the clerk. *Houston v. Lack*, 487 U.S. 266, 270-71, 108 S. Ct. 2379 (1988);
 26 *Huizar v. Carey*, 273 F.3d 1220, 1222 (9th Cir. 2001); see also Habeas Rule 3(d). For
 27 purposes of the timeliness analysis, the Court finds Petitioner constructively filed the
 28 Petition by delivering it to the prison mail system on September 3, 2013, which is the
 date handwritten next to the signature of a prison official on the back of the envelope
 containing the petition.

II. DISCUSSION

A. Statute of Limitations

The Petition is governed by the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”), which establishes a one-year statute of limitations for state prisoners to file a federal habeas petition. 28 U.S.C. § 2244(d)(1). In most cases, the limitations period is triggered by “the date on which the judgment became final by conclusion of direct review or the expiration of the time for seeking such review.” 28 U.S.C. § 2244(d)(1)(A).

As discussed above, Petitioner was convicted of the above offenses on August 8, 1996, and the California Court of Appeal affirmed the judgment on April 8, 1998. Because Petitioner did not file a petition for review of that decision in the California Supreme Court, his conviction became final for purposes of AEDPA's limitations period on May 18, 1998, the fortieth day after the California Court of Appeal affirmed the judgment. See CAL. CT. R. 8.366(b)(1); 8.500(e)(1); *Waldrip v. Hall*, 548 F.3d 729, 735 (9th Cir. 2008); *Smith v. Duncan*, 297 F.3d 809, 812-13 (9th Cir. 2002).

16 The statute of limitations then started to run the next day, on May 19, 1998, and
17 ended a year later on May 19, 1999. 28 U.S.C. § 2244(d)(1)(A); *see also Patterson v.*
18 *Stewart*, 251 F.3d 1243, 1245-47 (9th Cir. 2001) (the limitations period begins to run
19 on the day after the triggering event pursuant to Fed. R. Civ. P. 6(a)). As also stated
20 above, Petitioner did not constructively file his pending Petition until September 3,
21 2013 -- 5,221 days (more than fourteen years) after the expiration of the limitations
22 period. Accordingly, absent some basis for tolling or an alternative start date to the
23 limitations period under 28 U.S.C. § 2244(d)(1), the pending Petition is considerably
24 time-barred.

B. Statutory Tolling

26 AEDPA includes a statutory tolling provision that suspends the limitations
27 period for the time during which a “properly-filed” application for post-conviction or
28 other collateral review is “pending” in state court. 28 U.S.C. § 2244(d)(2); *Waldrip*,

1 548 F.3d at 734; *Bonner v. Carey*, 425 F.3d 1145, 1148 (9th Cir. 2005). However, to
 2 qualify for statutory tolling, a state habeas petition must be filed before the expiration
 3 of AEDPA's limitations period. *See Ferguson v. Palmateer*, 321 F.3d 820, 823 (9th
 4 Cir. 2003) ("[S]ection 2244(d) does not permit the reinitiation of the limitations period
 5 that has ended before the state petition was filed."); *see also Webster v. Moore*, 199
 6 F.3d 1256, 1259 (11th Cir. 2000) ("A state-court petition [] that is filed following the
 7 expiration of the limitations period cannot toll that period because there is no period
 8 remaining to be tolled.").

9 As discussed in detail above, Petitioner has filed four state habeas petitions, all
 10 of which were denied. However, the first of those petitions was not filed until February
 11 6, 2007, 2,820 days (nearly eight years) after AEDPA's limitations period expired on
 12 May 19, 1999. Thus, Petitioner is not entitled to any statutory tolling. *Ferguson*, 321
 13 F.3d at 823; *Webster*, 199 F.3d at 1259.

14 C. Alternative Start of the Statute of Limitations

15 1. State-Created Impediment

16 In rare instances, AEDPA's one-year limitations period can run from "the date
 17 on which the impediment to filing an application created by State action in violation
 18 of the Constitution or laws of the United States is removed, if the applicant was
 19 prevented from filing by such State action." 28 U.S.C. § 2244(d)(1)(B). Asserting that
 20 the statute of limitations was delayed by a state-created impediment requires
 21 establishing a due process violation. *Lott v. Mueller*, 304 F.3d 918, 925 (9th Cir. 2002).
 22 Petitioner has not alleged or set forth any facts for an alternate start date of the
 23 limitations period under this provision.

24 2. Newly Recognized Constitutional Right

25 AEDPA provides that, if a claim is based upon a constitutional right that is
 26 newly recognized and applied retroactively to habeas cases by the United States
 27 Supreme Court, the one-year limitations period begins to run on the date which the new
 28 right was initially recognized by the Supreme Court. 28 U.S.C. § 2244(d)(1)(C).

1 Petitioner has not alleged or set forth any facts for an alternate start date of the
2 limitations period under this provision.

3 **3. Discovery of Factual Predicate**

4 AEDPA also provides that, in certain cases, its one-year limitations period shall
5 run from “the date on which the factual predicate of the claim or claims presented could
6 have been discovered through the exercise of due diligence.” 28 U.S.C. §
7 2244(d)(1)(D); *Ford v. Gonzalez*, 683 F.3d 1230, 1235 (9th Cir. 2012). Petitioner has
8 not alleged or set forth any facts for an alternate start date of the limitations period
9 under this provision.

10 **D. Equitable Tolling**

11 AEDPA’s limitations period “is subject to equitable tolling in appropriate cases.”
12 *Holland v. Florida*, 560 U.S. 631, 130 S. Ct. 2549, 2560 (2010). Specifically, “a
13 litigant seeking equitable tolling bears the burden of establishing two elements: (1) that
14 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance
15 stood in his way.” *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807 (2005);
16 *Lawrence v. Florida*, 549 U.S. 327, 336, 127 S. Ct. 1079 (2007). However, “[e]quitble
17 tolling is justified in few cases” and “the threshold necessary to trigger equitable tolling
18 [under AEDPA] is very high, lest the exceptions swallow the rule.” *Spitsyn v. Moore*,
19 345 F.3d 796, 799 (9th Cir. 2003) (*quoting Miranda v. Castro*, 292 F.3d 1063, 1066
20 (9th Cir. 2002)).

21 Petitioner has not alleged or set forth any facts for equitable tolling, so he has
22 failed to satisfy either *Pace* requirement and is not entitled to any equitable tolling.
23 *Pace*, 544 U.S. at 418; *see also Stancle v. Clay*, 692 F.3d 948, 953 (9th Cir. 2012)
24 (“The petitioner bears the burden of demonstrating that he or she is entitled to equitable
25 tolling.”).

26 **E. Alleged Actual Innocence**

27 In his Opposition to the MTD, Petitioner does not dispute any aspect of the
28 above statute of limitations analysis, or that this action is time barred. His sole

1 argument is that the Court should consider the merits of his time-barred claims on the
 2 basis of actual innocence. (Pet. at 5-6; attached pages (4); Witness Statement;
 3 Donaldson Decl.; Opp'n at 1-6.)

4 Under *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995), “a credible claim of
 5 actual innocence constitutes an equitable exception to AEDPA’s limitations period, and
 6 a petitioner who makes such a showing may pass through the *Schlup* gateway and have
 7 his otherwise time-barred claims heard on the merits.” *Lee v. Lampert*, 653 F.3d 929,
 8 932 (9th Cir. 2011). However, “[i]n order to present otherwise time-barred claims to
 9 a federal habeas court under *Schlup*, a petitioner must produce sufficient proof of his
 10 actual innocence to bring him within the narrow class of cases . . . implicating a
 11 fundamental miscarriage of justice.” *Id.* at 937 (internal quotation marks and citations
 12 omitted). While a petitioner is not required to proffer evidence creating an “absolute
 13 certainty” about his innocence, the *Schlup* gateway is an “exacting standard” that
 14 permits review only in the “extraordinary case.” *Id.* at 938; *see also House v. Bell*, 547
 15 U.S. 518, 538, 126 S. Ct. 2064 (2006). Specifically, Petitioner must show “that it is
 16 more likely than not that no reasonable juror would have convicted him in the light of
 17 the new evidence.” *Lee*, 653 F.3d at 938; *Schlup*, 513 U.S. at 327. The evidence of
 18 innocence must be “so strong that a court cannot have confidence in the outcome of the
 19 trial unless the court is also satisfied that the trial was free of nonharmless
 20 constitutional error.” *Lee*, 653 F.3d at 938-39; *Schlup*, 513 U.S. at 316. Further,
 21 Petitioner must support his allegations “with new reliable evidence - whether it be
 22 exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical
 23 evidence - that was not presented at trial.” *Schlup*, 513 U.S. at 324.

24 Petitioner’s actual innocence claim only concerns four of the nine counts of
 25 conviction, and hinges on his allegations that Donaldson has come forward to repudiate
 26 his trial testimony. In support of Petitioner’s assertions, he attaches to his Petition: (1)
 27 the Witness Statement, which is an unauthenticated synopsis of a November 26, 2010
 28 interview between a private investigator and Donaldson; (2) a document purporting to

1 be Donaldson's own Declaration, also unauthenticated, dated November 17, 2011. The
2 substance of both documents, in pertinent part, is fairly summarized as follows.
3 Donaldson was Petitioner's cohort. Donaldson claims he was "indirectly" given an
4 offer of a reduced sentence in exchange for his testimony against Petitioner. He also
5 states that he lied when he testified that implicating Petitioner was not part of his plea
6 agreement. Donaldson claims the detectives investigating the robberies had a vendetta
7 against, and a "real hatred" for, Petitioner and wanted him off the street. Donaldson
8 recalls that he personally committed four robberies and Petitioner was only present
9 during two or three. Donaldson now believes Petitioner was prosecuted for more
10 robberies than he committed. Despite Petitioner being implicated as having pointed a
11 gun at a child during one robbery, Donaldson does not recall children being present
12 during any of the robberies, but he states that the detectives coached him to say so, and
13 told him he would be punished if he did not "speak on those robberies." As a result,
14 Donaldson states he falsely testified at trial that he observed Petitioner confront two
15 men and a girl between two and four years old. Also apparently despite testifying
16 otherwise, Donaldson now claims he never saw anyone pistol-whipped, had no
17 knowledge of Petitioner committing a robbery on the day the men were arrested, and
18 never saw Petitioner with a wallet or woman's purse. Donaldson also claims he was
19 "coached" by detectives to provide false details and locations of the robberies, and
20 some of his testimony was the result of that coaching instead of his own recollection.
21 Additionally, Donaldson believes the police used robberies committed by two other
22 suspects to build a case against Petitioner and Donaldson. Donaldson states that one
23 of those other suspects told him he was threatened with prosecution for the robberies
24 unless he testified against Petitioner and Donaldson. (Witness Statement at 1-3;
25 Donaldson Decl. at 1-2.)

26 Petitioner's assertion of actual innocence falls grossly short. First, even assuming
27 Donaldson's Declaration and the Witness Statement are authentic, they are certainly
28 not "new reliable evidence . . . that was not presented at trial." *Schlup*, 513 U.S. at 324

(emphasis added). At the outset, Petitioner's conclusion that Donaldson recanting his testimony means he testified falsely is rejected on its face. *See Allen v. Woodford*, 395 F.3d 979, 994 (9th Cir. 2005) (witness's "later recantation of his trial testimony does not render his earlier testimony false."). But even more important, setting aside the many reasons to view *any* recanting testimony with suspicion,^{2/} Donaldson's assertions are particularly unreliable because they were made no sooner than November 26, 2010, more than fourteen years after he testified at Petitioner's trial. *See Christian v. Frank*, 595 F.3d 1076, 1084 n.11 (9th Cir. 2010) (recantation found "especially unreliable" because it was made more than a decade after the witness testified at trial).

Donaldson's recantation is rendered even more suspicious by the fact that he did not make it until it was safe for him to lie under oath. Donaldson was sentenced on August 30, 2010, for the first degree murder of his girlfriend, so he is already in prison for the foreseeable future, and the statute of limitations for perjury at Petitioner's trial has expired. *See People v. Donaldson*, No. E051750, 2012 WL 12847, at *1 (Cal. Ct. App. Jan. 4, 2012); CAL. PENAL CODE §§ 126, 801; (state court records.^{3/}) Donaldson's "wholesale disavowal of parts of his previous testimony" fails to satisfy the *Schlup* standard in part because he now "faces almost no consequences for lying." *See Smith v. Baldwin*, 510 F.3d 1127, 1141-42 (9th Cir. 2007).

^{2/} "Recanting testimony has long been disfavored as the basis for a claim of innocence. Appellate courts, even on direct review, look upon recantations with extreme suspicion. (Citations and footnote omitted.) Recanting testimony is easy to find but difficult to confirm or refute: witnesses forget, witnesses disappear, witnesses with personal motives change their stories many times, before and after trial." *Carriger v. Stewart*, 132 F.3d 463, 483 (9th Cir. 1997) (Kozinski, J., dissenting).

^{3/} The Court takes judicial notice of Internet records relating to this action in the state appellate courts (available at <http://appellatecases.courtinfo.ca.gov>). *See Smith v. Duncan*, 297 F.3d 809, 815 (9th Cir. 2002) (federal courts may take judicial notice of related state court documents), *overruled on other grounds as recognized in Cross v. Sisto*, 676 F.3d 1172 (9th Cir. 2012).

1 Additionally, the Court rejects Petitioner's contention that Donaldson has given
 2 "valid reasons" for testifying falsely. (Opp'n at 4.) Instead, the Court concurs with
 3 Respondent's conclusion that it "strains credulity" to claim officers would coerce
 4 Donaldson to falsely implicate Petitioner, based on a vendetta and desire to make sure
 5 he did not go free, when only four of nine counts are at issue, accounting for only
 6 seventeen years and four months of Petitioner's fifty-six-year and four-month sentence.
 7 (See MTD at 21; CT at 2185-87.)

8 The foregoing establishes Petitioner has not proffered *reliable*, new evidence of
 9 his innocence. *Schlup*, 513 U.S. at 324.

10 Second, assuming the truth of Petitioner's assertions, if Donaldson did testify
 11 falsely at the time of his trial - implicating Petitioner in robberies, and violent acts
 12 against children, he did not commit - the proffered evidence is also not "new reliable
 13 evidence." *Schlup*, 513 U.S. at 324 (emphasis added); *see also Chestang v. Sisto*, 522
 14 Fed. Appx. 389, 391 (9th Cir. 2013) (cited pursuant to 9th Cir. R. 36-3) ("[A]ctual
 15 innocence claims focus on 'new' evidence - i.e., 'relevant evidence that was either
 16 excluded or unavailable at trial.'") (*quoting Schlup*, 513 U.S. at 327-28). Petitioner was
 17 obviously aware of his own actions, and he was present at his trial. While Donaldson's
 18 recantation is ostensibly "new" as of 2010 and 2011, it concerns allegedly false
 19 testimony that took place in 1996, and which was clearly within Petitioner's
 20 knowledge. That is, if the facts as Donaldson now ostensibly alleges were true,
 21 Petitioner was aware of those facts at the time of trial, yet he never attempted to bring
 22 them to any court's attention earlier than his state habeas petition filed on December
 23 19, 2011. *Id.*; *see also McQuiggin v. Perkins*, --- U.S. ----, ----, 133 S. Ct. 1924, 1935
 24 (2013) ("Unexplained delay in presenting new evidence bears on the determination
 25 whether the petitioner has made the requisite showing.").

26 Third, Petitioner has failed to show Donaldson's recantation would overcome
 27 the evidence at trial. His arguments ignore the fact that Donaldson's testimony was not
 28 the only evidence of his guilt of the four counts at issue. Indeed, as to those counts,

1 Petitioner's guilt was established by numerous facts, such as a field show-up
 2 identification of the victims themselves (RT at 1446, 1519); another victim's accurate
 3 description of Petitioner's physical characteristics (RT at 1407-09, 1417, 1425, 1909);
 4 Petitioner's attempt to flee the police (RT at 1726, 1730, 1929-31, 1955, 1967-70);
 5 Petitioner's post-arrest statement that he was "going to prison for this" (RT at 1910-
 6 11); Petitioner's statement to the police that he disposed of the gun he used (RT at
 7 1913, 1916); Petitioner's accurate identification of the location of a stolen purse (RT
 8 at 1920-23, 2168-69); as well as the very similar modus operandi between the robberies
 9 at issue and several other robberies Petitioner committed, including accosting victims
 10 in the street in the Pasadena area shortly after nightfall, brandishing a handgun,
 11 demanding their purses and wallets, then immediately fleeing. *See United States v.*
 12 *Momeni*, 991 F.2d 493, 494 (9th Cir. 1993) (finding evidence of modus operandi alone
 13 may be sufficient to establish a perpetrator's identity). Consequently, Petitioner has not
 14 shown "that it is more likely than not that no reasonable juror would have convicted
 15 him in the light of the new evidence." *Lee*, 653 F.3d at 938; *Schlup*, 513 U.S. at 327.

16 Put another way, under the circumstances, "[a]ssessing 'how reasonable
 17 [factfinders] would react to the overall, newly supplemented record,'" it is highly
 18 unlikely "every juror would have reasonable doubt that [Petitioner] was guilty."
 19 *Chestang*, 522 Fed. Appx. at 391 (quoting *Lee*, 653 F.3d at 929).

20 Petitioner has not presented a credible claim of actual innocence such that he
 21 "may pass through the *Schlup* gateway and have his otherwise time-barred claims heard
 22 on the merits." *Lee*, 653 F.3d at 932.

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ORDER

2 Based upon the foregoing, IT IS HEREBY ORDERED THAT Respondent's
3 MTD is GRANTED and the Petition is dismissed with prejudice as time-barred. The
4 Clerk is directed to enter judgment dismissing this action with prejudice and serve a
5 copy of this Order on all counsel or parties of record. Any and all pending motions are
6 denied as moot and terminated.

10 | Dated: January 10, 2014


ARTHUR NAKAZATO
UNITED STATES MAGISTRATE JUDGE